BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of:	)	
	)	
Request of A.C. Nielsen Co. for Permissive Use of Line 22 of the Active Portion of the Television Video Signal	)	DA 89-1060

RESPONSE OF VIDCODE, INC. IN SUPPORT OF VIDCODE'S MOTION TO WITHDRAW NIELSEN'S TEMPORARY AUTHORITY

On May 10, 1990, VidCode Inc. ("VidCode") filed a motion with the Commission to withdraw the special temporary permissive authority granted to A.C. Nielsen Company ("Nielsen") to encode line 22 of the active portion of the television video signal. Nielsen filed its opposition to that motion on May 21, 1990. In this Memorandum, VidCode responds to Nielsen's assertions, which are generally unsupported and unsupportable.

A. Nielsen Has Failed to Justify Its Patent Violation of the Commission's Order

As VidCode has demonstrated, Nielsen violated the express terms of the Commission's order granting Nielsen special temporary authority to encode line 22. In particular, Nielsen openly encoded commercial materials despite the explicit language of the Commission's order that:

> Nielsen must ensure that its AMOL encoding of line 22 is wholly confined to the program material which it legitimately seeks to track and does not adversely affect AirTrax's or others' use of that line for other legitimate purposes. (emphasis added)

In its reply, Nielsen does not deny that it was encoding commercial materials on line 22. To the contrary, it admits this incident (and apparently other such incidents) of intentional encoding of commercials on line 22. Nielsen suggests that, notwithstanding the express language of the Commission's order,[1] it may encode any materials, including commercials which for which its customers request monitoring. In effect, Nielsen poses a simple defense: Nielsen has some special right and entitlement to ignore the clear meaning of the Commission's orders and to ignore those conditions of the Commission's

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1. If there were any doubt that Nielsen was not being granted unlimited authority to encode commercial materials, it was eliminated by the Commission's explicit and unambiguous rejection of Nielsen's previous offers of coexistence with AirTrax:

> AirTrax contends that [Nielsen's AMOL] signal will simply be placed over both the program material and the commercial material in a given program package. This, in turn, will overwrite AirTrax's commercial tracking codes . . . . In reply, Nielsen asserts that it will make every effort to assist AirTrax in ensuring that AirTrax codes are not deleted or replaced by the AMOL signal. We do not believe that this is sufficient.

Letter Commission staff to Nielsen, dated November 22, 1989. (emphasis added)

orders which restrict their operation and protect the operations of Nielsen's competitors on line 22. Apparently, Nielsen deems itself to be subject only to the Commission's conditions which Nielsen finds acceptable.

Nielsen's defense is no defense at all. Despite Nielsen's assertions that the language is unambiguous in authorizing encoding of commercials, Nielsen has also admitted that not only did VidCode understand the Commission's order as barring such commercial encoding on line 22, so did Nielsen's own programmer clients. See, Nielsen's May 11, 1990 Motion to Clarify at 1. Indeed, VidCode submits that there is no principled, reasonable way to read the Order without recognizing that the Commission was treating Nielsen's encoding of commercials in one manner and "other programing materials" in another. Nielsen was ordered to limit its encoding to the latter and to ensure that it did not encode the former.

Even assuming that Nielsen was somehow confused by this clear language, Nielsen's arrogant and unyielding approach to co-existing on line 22 is clear from its conduct. Rather than seek clarification of its authority before disregarding the terms of the Commission's order as understood by its own customers, it went ahead and

surreptitiously[2] encoded commercials using line 22, apparently hoping (and expecting) that it would not be caught. Only when it was caught did it seek clarification.

Moreover, Nielsen has failed to demonstrate that it met the other conditions of the Commission's order. While it submitted a letter from the programmer suggesting that, in general, it had requested Nielsen to monitor their programs and commercials, Nielsen has failed to demonstrate that the local licensee had been notified of and had agreed to the AMOL encoding on line 22, as required by the Commission's order.[3]

Simply stated, Nielsen's words and deeds indicate that it cannot be trusted to co-exist on line 22 with other users[4] and therefore its special temporary authority to encode on that line should be withdrawn. The Commission

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2. Neither the Commission nor the other line 22 users were notified in advance of this intended practice by Nielsen. Indeed, Nielsen did not even advise the Commission or the competitors where or when the encoding was being broadcast.

3. "We require that broadcasters be advised of any program material that is AMOL encoded, and remain free to 'strip' it from the video signal if desired."

4. It is the Commission's clear and unmistakable policy that authorized users of coded signals on lines 20 and 22 must co-exist. The monopolization of one of those lines is therefore inconsistent with Commission policy. Nielsen's attempt to extend its Line 20 monopoly to line 22 is a fortiori inconsistent with the August 6, 1981 Radio Broadcasting Services order, 46 Fed. Reg. 40024.

expressly reserved the discretion to withdraw the authority summarily under just these circumstances. Nielsen has failed to demonstrate any reason for the Commission to withhold acting now.

B. Nielsen's Erroneous Concept of Verification Markets

Nielsen's Memorandum in Opposition attempts to belittle VidCode as ignorant of the realities of the ratings business, and Nielsen implies, therefore, that VidCode's arguments are somehow unworthy of consideration by the Commission. Whether or not Nielsen's comments are true, the state of VidCode's knowledge of the ratings business is irrelevant, both generally as an inappropriate argument and more specifically because line 22 encoding is not used in the first instance for ratings, but only for broadcast verification. This is true not only for VidCode's business but also for Nielsen's. While Nielsen may use the verification of broadcast at a later stage in preparing ratings, it is clear from its own descriptions that AMOL is in the first instance a verification service.

It is clear from Nielsen's own arguments that it is Nielsen which is ignorant of the full scope and operation of the verification business. Nielsen asserts, for instance, that there is only one principal customer for verification services on a particular program or commercial,

and that VidCode and Nielsen are simply in competition for servicing that one customer. That is false. While it is true that programmers have an interest in encoded verification, there are many other parties interested in the same type of information. The independent interests of these parties all equally promote the business of broadcasting and therefore equally fall within the purview of the Commission.

Moreover, in some circumstances these independent interests are necessarily in conflict and cannot all be served by one verification service. For example, not only does the syndicator have an interest in knowing that its full package (including commercials) are broadcast, but so does the advertiser have an interest in knowing that its particular commercial was included in the package. The advertising agency which produced the commercial and arranged for its broadcast may have its own interests in verifying broadcast. The interests of these parties may be in conflict the interests of the syndicator, which would benefit from any data showing that the packaged commercials were broadcast while the sponsor would benefit from any data

indicating that the commercial was not broadcast per contract or that the quality of broadcast was substandard.[5]

Similarly, actors who have a residual financial interest in the syndicated programming have an interest in knowing the number of times and the markets in which the program is shown. The syndicators, on the other hand, would likely prefer to control all such data.

As Nielsen appears to concede elsewhere, if each of these interests is to be served, this requires that independent sources of verification data exist for each. However, if Nielsen is allowed to monopolize both lines 20 and 22 on behalf of the interests of syndicators merely because the syndicators have the last access to the package of programming and commercials, only the interests of the syndicators will be served.[6] This is true because the

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5. As reflected in the comments of Southwest Missouri Cable, cable companies have their own sets of interests in verifying broadcasts, which may conflict with the networks, the syndicators, the commercial sponsors and other parties.

6. It is our understanding that, at a conference in Florida during May, Nielsen has publicly informed syndicators that their proposed system will encode <u>both Lines 20 and 22 simultaneously</u> on all monitored syndicated programming. It is now clear that, in light of Nielsen's intentions, not only will Nielsen preclude competition on Line 22, it will not even leave room on Line 20 for innovative new uses. In effect, Nielsen proposes to obliterate any codes which could compete with AMOL through any available method. This further makes it clear that Nielsen intends to dedicate both

(continued...)

syndicators will be able to use Nielsen's line 22 encoding to obliterate encoding performed on behalf of, for example, advertisers or performing talent (actors, producers, directors).

Thus, unless Nielsen's encoding on behalf of syndicators does not exhaust the available channels for verification (i.e., unless Nielsen is not authorized to monopolize both lines 20 and 22), the Commission will have allowed the destruction of any practical system for servicing the independent interests of advertisers and other persons whose interests are at least as important to the broadcast industry as are the interests of the syndicators.

C. Nielsen's Marketplace Advantages Do Not Derive from Legitimate Reasons or Superior Service

Nielsen argues that this is merely a function of broadcast "Darwinism," a reflection that a superior service has destroyed an inferior service. Nielsen asserts that the Commission should not interfere "to prevent a superior competitor from using legitimate means to gain a preeminent position in the marketplace." Nielsen's Opp. at 5.

This too shows Nielsen's utter disdain for market realities. Nothing about Nielsen's AMOL services is

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6. (...continued)
Lines 20 and 22 solely in the interests of its syndication customers and leave all other interests unserved by independent services.

superior to VidCode's, and Nielsen's intended predation upon its competitors is hardly legitimate.

First, Nielsen's advantages, such as they are, do not derive from any legitimate competitive actions or from any qualities of its AMOL verification service. Rather, they derive from the syndicators desperation in being excluded previously from Nielsen's ratings. Nielsen has linked its monopoly position for ratings with a policy of refusing to accept verification data from other services. Recognizing this and the business significance of obtaining Nielsen ratings for their programs, the syndicators have no choice but to commit their encoding to Nielsen's AMOL rather than to any other verification service.[7]

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7. Nielsen could de-link ratings from AMOL verification and allow other independent verification sources to provide data consist with its pre-established criteria. It has refused to do so for unstated reasons. Until this occurs, there is no basis for asserting that its market position for verification services sold to syndicators is due to its superior system or to any legitimate marketplace advantage. It is merely the result of the nascent extension of market power in one service to monopolize a second service. The Supreme Court has held this type of activity to be a per se violation of the Antitrust Laws. See, Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984) ("Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such 'forcing' is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.")

Moreover, should the syndicators allow Nielsen to overwrite other encoded signals, this would jeopardize services providing data to advertisers, program talent, cable systems and other persons whose financial interests may not be fully consistent with those of the syndicators. Thus, from the viewpoint of these other interests, Nielsen's proposed use of line 22 for the exclusive benefit of syndicators is inherently inferior to the services of VidCode.[8]

Second, we are dealing here with a very limited channel of competition characterized by technological "bottlenecks." Nielsen already monopolizes one of the two available bottlenecks (i.e., line 20). Its competitors were directed by the Commission to use the only other available alternative, line 22, to avoid interference with and from the Nielsen AMOL system. Now Nielsen seeks to exhaust that alternative as well. The commitment of all such channels of competition into the hands of one competitor can not be characterized as legitimate and procompetitive.

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8. To illustrate this, one need only view the tape which VidCode provided. Nielsen encoded both the program and the commercials with the exact same data. All that the commercial sponsor can determine from Nielsen's information is that a package of materials distributed by Warner Bros. was broadcast. Whether or not the sponsor's particular commercial was broadcast cannot be determined from the Nielsen encoding.

Third, any fair comparison of the VidCode and AMOL systems demonstrates that it is the VidCode system which is superior. Nielsen's AMOL system merely identifies when a program is broadcast. It serves no other purpose than this. VidCode, on the other hand, not only serves this identification function, it also verifies the quality of the broadcast. It shows, for example, not only that a commercial or program was broadcast at a particular time and on a particular station, it also measures the level and extent of interference or interruption. AMOL cannot be used to perform this quality control/verification function.

D. The Facts DO NOT Indicate that Nielsen Needs to Encode Line 22

Nielsen attempts to belittle the evidence of record and assert that its need for access to line 22 is beyond challenge. This line of argumentation is based on Nielsen's speculation, hyperbole, misstatement, and unsupported contentions.

Nielsen asserts that the Commission has irrevocably, "conclusively resolved" that Nielsen must have access to line 22. In this manner, Nielsen attempts to convert the Commission staff's preliminary observations into a res judicata holding which cannot be reopened. As a procedural and evidentiary matter, Nielsen is wrong for at least six reasons.

-- First, Nielsen cannot have it both ways. It cannot attempt on the one hand to reopen the Commission's rulings through its "Motion to Clarify Authority," and on the other hand claim that the record is closed to VidCode.

-- Second, Nielsen's claim is inconsistent with the Commission's request for comments on whether and how the Nielsen system can be made to operate consistently with other systems authorized to use line 22.

-- Third, Nielsen's claim is particularly unfair here, since despite its clear knowledge of VidCode's interest in the matter, Nielsen did not give VidCode notice and opportunity to present its full arguments prior to the September 1989 Notice and VidCode was not included in ex parte conferences during Fall 1989 in which, presumably, Nielsen presented its evidence on which the Commission's staff may have relied.

-- Fourth, any Nielsen evidence on its need for access to line 22 must have been presented at these ex parte meetings because the record is otherwise utterly barren of any such proof. There is, for example, not even a single piece of credible evidence in record showing that there is some "well-recognized problem of 'stripping' codes from line 20," as Nielsen asserts, Opp. at 2.

-- Fifth, the only hard evidence on this matter submitted to date is the tape submitted by VidCode which shows that Line 20 was encoded and rebroadcast.

-- Sixth, Nielsen has throughout this proceeding born the burden of showing that this is not the common occurrence. If Nielsen has some evidence to the contrary, it would have submitted it. Nielsen has simply failed to explain its failure to submit this evidence and bear its burden of proof.

Moreover, as a substantive matter, Nielsen's assertions in regarding the extent to which stripping occurs are inherently incredible. First, Nielsen seems to have

asserted at the beginning of this proceeding that this was a function of some small number of obsolete machines which cannot be corrected. As both AirTrax and VidCode conceded, there may be a small number of these obsolete machines (although they are likely to have been replaced long ago). For the sake of argument, VidCode has been willing to assume that a conservative estimate might be that there are 20 to 50 such machines at licensees monitored regularly by Nielsen. This, in VidCode's opinion, substantially overstates the number. As discussed in the Affidavit of Leonard D. Keene, (submitted herewith), VidCode believes that there are probably few -- if any -- recording devices which automatically and uncontrollably strip line 20.

In any event, Nielsen responded to this by asserting that "the fact is that it is impossible to predict when a video tape recorder ("VTR") will strip code at specific times. . . . This means that [VTRs at] some 1300 stations" may be automatically and uncontrollably stripping line 20. At this stage of the proceeding, this is an incredible statement. Nielsen claims to have been testing its system at hundreds of stations and yet cannot provide any meaningful statistics on stripping!

Merely by proffering this assertion, Nielsen has demonstrated a near-total ignorance of the mechanical system

through which syndicated programming is copied and rebroadcast. As the Keene Affidavit demonstrates, representatives of the major manufacturers of recording devices report that their equipment is designed to faithfully reproduce signals on line 20, as well as the rest of the VBI. Nielsen's problems (if any) in assuring rebroadcast of codes is in general not related to the VTR or other recording equipment, but to intentional actions of local broadcasters in setting their equipment to overwrite Nielsen's line 20 signals. This is not a reflection of equipment problem, but rather a reflection of local broadcaster non-cooperation with Nielsen.

As VidCode has demonstrated, this intentional stripping could be overcome by the syndicators themselves. The syndicators could require, through contractual provision, that the broadcasters not strip line 20. The broadcasters could then program their recording equipment (and, if necessary, the time based correctors which control and synchronize the equipment) not to overwrite identifying information on Line 20. There is no evidence in the record that this would not be fully effective.[9]

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9. Nielsen has mischaracterized VidCode's suggestion in this regard by suggesting that it proposes the encoding of non-independent signal. To the contrary, it was VidCode's suggestion that the syndicators could, through contractual (continued...)

Further, Nielsen belittles VidCode's suggestion that line 20 reencoders could solve Nielsen's concerns at the small (if any) number of stations using obsolete VTRs. Nielsen again mischaracterizes this proposal by suggesting that it would result in non-uniform coding and would threaten independence. VidCode's proposal presumes that Nielsen has obtained the cooperation of the local broadcaster, since the Commission has already directed that no broadcast of encoding occur without that cooperation. Assuming cooperation, therefore, it was VidCode's proposal that Nielsen (or the syndicators themselves) would provide the proper AMOL code to the station and that this would then be reencoded. Nielsen cannot argue that this cannot be done, since it is merely a variant of the system implemented by Nielsen now. Nielsen provides the AMOL code to the production house which is responsible for packaging the programming. In other words, AMOL encoding is placed fully within the hands of non-Nielsen personnel. VidCode's proposal is thus strictly analogous to Nielsen's own system.

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9. (...continued)
negotiation, require the line 20 broadcast of Nielsen's AMOL or any other independent code the syndicator and the licensee would agree to. There is no evidence that this proposal has been tried by Nielsen and its customers, let alone rejected by the marketplace, as Nielsen suggests. Opp. at 14.

This proposal does not threaten the independence of the verification system any more than Nielsen's current system. Indeed, there is nothing "independent" about Nielsen's AMOL system now. The current AMOL encoding system is totally outside the control of Nielsen. The production house, acting on behalf of the syndicator, can put any AMOL code on a program, and Nielsen would have no way of correcting misencoding (whether intentional or otherwise). While Nielsen may charge VidCode with naivete, it is Nielsen which naively -- or otherwise -- attempts to suggest that its current line 20 and proposed line 22 system of encoding somehow assures independence.

E. The Precedents Cited By Nielsen Actually Support VidCode's Position

Lastly, VidCode notes that the precedents cited by Nielsen (see Opp. at 7, note 5) do not support Nielsen's positions in this proceeding. To the contrary, they demonstrate that VidCode's position is consistent with Commission policy and precedent.

Thus, for example, Nielsen has cited Amendment of Parts 2, 73 and 76 of the Commission's Rules to Authorize the Offering of Data Transmission Services on the Vertical Blanking Interval by TV Stations, 57 R.R.2d 832 (1985). As held by the Commission therein, local broadcasters are authorized to make lines 1-18 and line 20 of the VBI

available for data services, including Nielsen's AMOL, if desired by the syndicators. Nielsen's claim that they have no alternative but to move their syndication AMOL service to Line 22 is inherently inconsistent with the Commission's rules set forth in this decision. Indeed, one question which Nielsen has never addressed is why AMOL cannot be moved on syndicated programming to any of lines 1-18.

Similarly, Nielsen cites Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service, 3 F.C.C.Rcd. 7033, 7041 (1988). This decision cannot possibly support Nielsen's demand that it be authorized to predate on its competitors without regulation or limitation. In that decision, the Commission was considering whether to allow a new use of a spectrum of limited availability for which there were already authorized uses. In authorizing this new use, the Commission expressly required "a complete technical analysis of all potential interference before implement[ation]," id., at 88, and directed that the new users would be required to take affirmative steps to assure compatibility with the existing uses. This is directly analogous to VidCode's request that Nielsen's use of line 22 be required to be compatible with VidCode's already-

authorized use. Consistent with this precedent, the Commission should require open, monitored testing of the Nielsen proposed use of line 22 (i.e., "a complete technical analysis of potential interference") and should order Nielsen to take all necessary steps to assure compatibility and coordination.

Also inconsistent with Nielsen's position is the Commission's report and order in Revisions to Part 21 of the Commission's Rules Regarding the Multipoint Distribution Service, 2 F.C.C.Rcd. 4251 (1987). There, the Commission confirmed its "deregulatory" policy which Nielsen has repeatedly -- and inaccurately -- invoked. As the Commission concluded, deregulatory policy is guided by four goals:

> "(1) to provide the best price to the end-user,
>
> (2) to maximize spectrum utilization,
>
> (3) to increase innovation,
>
> (4) and to enhance competition."

Id., at 4251. By contrast, the grant of Nielsen's request would destroy all remaining competition in the market for verification services and deter further innovation, thereby deterring price competition and promoting monopoly.

As demonstrated by these precedents cited by Nielsen, Nielsen's proposed use of line 22 -- employing

technology and practices which are incompatible with existing users -- is inherently inconsistent with Commission policy.

CONCLUSION

For these reasons, VidCode submits that Nielsen's violation of the conditions in the Commission's order clearly and unquestionably demonstrates Nielsen's unwillingness or incapability to coexist on Line 22. Its STA should be revoked on the basis of the violation, and any further consideration of its application for permanent authority should be denied (or at least postponed) until Nielsen demonstrates:

(1) that there are no other viable options for the use of alternatives to Line 22 encoding (including but not limited to those which VidCode has identified);

(2) that, through openly monitored tests, its AMOL system can coexist on Line 22 with other users; and

(3) that its proposal will not foreclose competition for verification services for persons other than syndicators.

Respectfully submitted,

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Date: June 8, 1990

Certificate of Service

I, Dolores M. Furnari, a secretary in the law firm of Weil, Gotshal & Manges, hereby certify that copies of the Memorandum in Support of Vidcode's Motion to Withdraw Nielsen's Temporary Authority were served on the 8th day of June, 1990, by hand and/or first class mail on the following:

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Request of A.C. Nielsen Co. for Permissive Use of Line 22 of the Active Portion of the Television Video Signal	DA 89-1060

CITY OF NEW YORK)
: ss:
STATE OF NEW YORK)

AFFIDAVIT OF LEONARD D. KEENE

LEONARD D. KEENE, being duly sworn, deposes and says:

1. I am currently employed by VidCode Inc,. and presently hold the title of Vice President for Engineering. I have been employed by VidCode for the past 11 months. By training, I am an engineer, having received a Bachelor of Science in Electrical Engineering from Northeastern University. Prior to my employment with VidCode, I have been an engineer for 25 years in the computer industry, generally involved in digital engineering. My functions at VidCode require that I understand the methods by which local broadcast stations record, reproduce and broadcast television programming and commercial materials. In particular, these functions require that I be fully aware of and understand the equipment used by the local broadcasters for these purposes.

2. At the request of VidCode's attorneys, I have reviewed the various pleadings of A.C. Nielsen Company filed in this proceeding. Nielsen's claim that there is widespread unintentional and uncontrollable "stripping" of data encoded on line 20 by Video Tape Recorders (VTRs) is inconsistent with my knowledge of the workings of the equipment at local broadcast stations and my independent contacts with representatives of the major manufacturers of this equipment. I am not aware of any facts which would support such claim.

3. Based on my personal knowledge of the market, there are four major suppliers of the recording, reproduction and rebroadcast equipment used at local stations: Ampex, Sony, Panasonic, and Odectics. These four companies are generally believed to represent between 70 and 90 percent of the market. I have personally contacted a representative of all but Ampex, all of whom assured me that their equipment is designed to faithfully reproduce line 20 if it is encoded. Any of their machines which is not reproducing line 20 faithfully could be adjusted to correct this.

4. This is true both for VTRs and the more important "carts" -- computerized automated video tape handling systems. VTRs, to the extent relevant, would be used to

copy programming distributed by satellite. This is one of the methods for distributing programming. In these circumstances, VTRs are commonly provided by the satellite distribution system so that the system can provide equipment automatically compatible with its satellite feed technology. There is no reason why these VTRs should automatically and uncontrollably strip line 20 encoding, although there may be a small number of obsolete ones which do strip line 20. In the major markets which Nielsen monitors on a regular basis, this number should be quite small and definitely should not exceed 20 to 50 units.

5. Many programs and commercials are also distributed by hardcopy master tape. In these circumstances, the stand-alone VTR is irrelevant, since it is not used. Rather, the local stations will copy the master through the cart onto a tape consistent with the cart's format. The cart then is used to traffic the video tapes onto the air at the correct time. In order to achieve this, at the time of copying, the cart places two pieces of information. On the tape cassette, the cart places a sticker indicating the name and other identification information. On the tape itself, the cart inserts cueing information. The placement of cueing varies from equipment, but as noted above, the major manufacturers of carts have told me that their machines